

No. 21767

IN THE

MAY 12 1969

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

GAY COTTONS, INC., *et al.*,

Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

PETITION FOR REHEARING.

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I.

Introduction.

In its opinion of April 24, 1969, this Court, while holding that the judgment of the District Court denying appellant limitation of liability under 46 U.S.C. § 183 could not be sustained on the basis articulated by that Court, nonetheless affirmed based on an application of The Pennsylvania Rule (86 U.S. 125, 1873) to “defects” in the radio direction finder (hereinafter RDF).

Appellant believes this analysis to have been based on a misunderstanding of both the facts and the law as applied to the RDF, a misunderstanding undoubtedly arising from the scant treatment of this issue in the briefs of all parties, and therefore directs its argument solely to that point.¹

II.

The Statute and Regulations.

47 U.S.C. § 351 (a) (2) and § 354 (h) (now (i)) required the CHICKASAW to have an RDF which is “efficient and capable of receiving clearly perceptible radio signals and of taking bearings from which the true bearing and direction may be determined.” The regulations as they stood at the time of the stranding (see Appendix) are found at 47 C.F.R. § 8.517 (a) and (b). Section 8.517 (a) requires that, “to be approved by the Commission”, the RDF must meet five technical specifications including, “(4) be accurately calibrated for the purpose of taking bearings from

¹Appellant is not unaware of the Court’s concluding footnote, Opinion p. 19, fn 31, which implies that limitation could be denied on several other grounds. Appellant does not, however, take this to be a ground for decision and simply advises that if it convinces the Court with respect to the need for a rehearing on the RDF issue, it is prepared, at the Court’s request, to brief its position with respect to these issues.

which the true bearing and direction may be determined for actual use in radio location service and maritime radio navigation service.”² Section 8.517 (b) requires that “. . . the *calibration* particulars shall be checked at yearly intervals or as near thereto as possible. A record of the *calibration* of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than one year from the date of the related action.” (emphasis added)

An understanding of these regulations requires an explanation of what an RDF is and how it is used. An RDF is essentially a radio receiver with a rotating antenna. By rotation of the antenna the operator can read from the equipment the bearing of a known RDF transmitting station and draw a line of position (hereinafter LOP) on the navigational chart. A second bearing taken on a different station immediately thereafter gives a second LOP and the intersection is a “fix”, that is the vessel’s position assuming the bearings are accurate.

An RDF is subject to three kinds of error: (1) inherent or ship induced errors [see Tr. pp. 537 and 538]; (2) transient error [Tr. pp. 539, 542, 544, 637]; and (3) errors which cannot be compensated for such as those due to night effect, land effect, and operator error [see *e.g.* Tr. pp. 493, and 877 c and d]. The

²The remaining four specifications were indisputably met. This Court states (at p. 18, fn 30) that the evidence is uncontradicted that the FCC did not itself inspect the RDF but only relied on the word of the owner and crew that the equipment was operative. In large part this is factually erroneous. Both the FCC and RCA clearly inspected the equipment for mechanical and electronic function, its ability to locate a particular station, and its sensitivity [Tr. pp. 962-8, 981-2]. The only thing they did not personally do was check the accuracy of the calibration. The reason for this is that the accuracy of the calibration can only be checked at sea [see Tr. p. 1003] thus in the nature of things both the FCC and Appellant had to rely on the crew to make this check.

first of these types of errors rarely changes substantially and is corrected for by *calibrating* the RDF when first installed [Tr. pp. 537-539]. Calibrating the RDF means mechanically adjusting the equipment so it automatically compensates for inherent errors. It is the *calibration* which must be *checked* for accuracy annually to pass the FCC inspection [see Ex. 59] and the calibration is adequate for the FCC inspection if it is within five degrees of the true bearing [Tr. p. 944]. The calibration is checked by the ship's crew by taking both a visual and an RDF bearing, on one RDF station in each of the four quadrants, as the vessel passes them [see Ex. 59].

It is clear from the regulations that what must be done annually is check the RDF's calibration for its continued accuracy. It need not be calibrated annually (as implied by this Court, see Opinion p. 17). It is further clear that what must be maintained on board for one year is not the record of the checks of the calibration; it is the record of any actual calibration (*i.e.* built in adjustment to the equipment) made because the deviation between the visual checks and the RDF bearings as previously calibrated exceeded five degrees in one or more quadrants (see Reg. 8.517 (b), "a record of the *calibration of any checks* made of their (the checks of the original calibration) accuracy shall be maintained on board the vessel for a period of not less than one year from the date of the related action", [and see Tr. pp. 969-971, testimony of FCC Inspector Hall].

III.

Did the Chickasaw's RDF Violate Either Statute or Regulation?

The evidence is clear that it did not. First, not one word of testimony appears in the record to indicate that at any time was there any mechanical or electronic

defect in the RDF. Second, everyone who used the RDF was satisfied that it was operating properly³ and the inconsistent fixes were attributed to night and land effect.⁴ Third, the only evidence comparing the actual bearings obtained with the true bearings as reconstructed from subsequently known facts, shows them all to have been within normal tolerance and well within the five degree deviation permitted by the FCC for statutory approval [See Tr. pp. 517-518, 642-643].

The position with respect to the two areas in which this Court felt it was "uncontradicted" that the ship did not meet the regulations is the same—there was no violation.

First, were the required annual accuracy checks carried out? The only evidence in the record is that they were. Both the FCC Inspector and the RCA technician engaged by Appellant to prepare the equipment for inspection, testified unequivocally that they observed a record of calibration check bearings taken on a date within ninety days of the inspection [see Tr. pp. 943, 967-968; 979, 985-989]. There was no evidence to the contrary—only a negative inference drawn by Appellees from the absence of these bearings in the documents rescued from the ship. It must be remembered that Appellees, as claimants below, had the burden of proving a statutory violation in order to bring into play the rule of *The Pennsylvania* (See *Walston v. Lambertsen*, 349 F. 2d 660 (9th Cir. 1965)). Viewed in that light this negative inference is of little weight. No one knows what happened to the record of checks of the calibration, it may still be on the vessel, but the testi-

³Tr. p. 104 (Patronis); Tr. p. 365 (Filippone); Tr. p. 1409 (Jensen); Tr. pp. 776-7 (English).

⁴Tr. p. 104 (Patronis); Tr. p. 1417 (Jensen); Tr. pp. 447-450 (Simms).

mony of Kroh and Hall that it existed at the only time relevant to a statutory violation is uncontradicted.⁵

Second, as to the alleged requirement that there be an up to date deviation card, there is no such statutory requirement. Up to date deviation information is something each Master is expected to obtain as he commences each trip [Tr. pp. 539, 845-847, 1075, 1088-1089] and a shipowner is reasonable in anticipating he will do so [Tr. pp. 635-636, 847]. Such a table of deviations is entirely different from the record of calibration checks which is the only record referred to in the statute or regulations (see *Infra* at pp. 9-10).

In addition to all this, there is the FCC certification itself. This Court (Opinion p. 18, fn 30) stated that Appellant could not rely on this certification to show statutory compliance citing *States SS Co. v. The U.S.*, 259 F. 2d 458, 700 (9th Cir. 1957) and *Sabin Towing Co. v. Brennan*, 72 F. 2d 490, 494 (5th Cir. 1934).

The Court, however, failed to distinguish between certificates as they bear on the general issue of unseaworthiness (what was involved in both cited cases) and as they bear on statutory compliance. As to the former such certificates are only evidence of what was done since the ultimate responsibility for seaworthiness rests on the owner, not regulatory bodies.⁶ In the instant

⁵There is a possible inference that this Court believes that because the posted table [Ex. 35] was dated 1957, no check of the calibration occurred in 1961. The posted table, however, was not a record of "checks" of calibration, it was a table of uncompensated errors (see *infra* pp. 9 and 10). To infer that because in 1962 the posted table of deviations was dated 1957, there was no check of the calibration in 1961 is a *non sequitur*, and assumes continued dereliction of duty by the FCC for four years (1958-61) contrary to the presumption that they carried out their statutory duties. (See *United States v. Chemical Foundation*, 272 U.S. 1 at p. 14).

⁶In addition, in *The States* case the owner knew of possible danger and therefore could not rely on regulatory bodies, at least
(This footnote is continued on the next page)

situation, the issue is far narrower, *i.e.* did the equipment comply with the statute. As to this the ultimate responsibility is that of the regulatory agency, and certification, because of the presumption that an official body carries out its tasks properly (see *Chemical Foundation* case *Supra* fn. 5) creates a *prima facie* case of statutory compliance. See also *The Princess Sophia*, 61 F. 2d 339 (9th Cir. 1932) at pp. 347-348 where this court held that the vessel's Canadian certificate was evidence of compliance with Canadian law, and its American certificate sufficient to relieve her "... from further compliance with American law as to lifesaving equipment.", and see *China Union Lines, Ltd. v. A. O. Anderson & Co.*, 364 F. 2d 769 (5th Cir. 1966) at pp. 785 and 786.

There was no finding of a statutory violation (nor even a proposed finding of such violation), and no evidence that one occurred.

IV.

Assuming a Statutory Violation, There Was No Privity or Knowledge.

The only violations claimed are an alleged failure to check the calibration particulars of the RDF, and failure to retain a record of those checks on board for one year. As to these two alleged violations this Court finds privity and knowledge because they were "of several years standing", citing *In re P. Sanford Ross*, 204 Fed. 284 (2nd Cir. 1913); *In re Henry DuBois' Sons Co.*, 198 F. Supp. 400 (S.D.N.Y. 1960) and *The Vestris*, 60 F. 2d 273, 280 (S.D.N.Y. 1932). But each of these cases except *The Vestris* involved obvious de-

without carefully checking to determine what they did, see discussion this Opinion at p. 6; and in *The Sabin Towing* case the issue was exoneration under the Harter Act where in any event the duty to use due diligence to make seaworthy is *non-delegable*.

fects in non-technical aspects of small vessels in close proximity to owners (see Opinion p. 12, fn. 20). And in *The Vestris* managerial personnel knew the vessel was overloaded and knew of the practice of overloading (see Opinion p. 14, fn 23). In contrast, in this case the violation of statute, if it occurred, related to complex electronic equipment serviced under contract by experienced technicians and inspected by the FCC. In analysis of this issue sight must not be lost of the careful distinction this Court drew between exoneration under COGSA where the duty to use due diligence to make seaworthy is nondelegable, and limitation of liability where, provided due care under the circumstances is exercised in the delegation, it is delegable (See Opinion pp. 5-15, particularly at pp. 7 and 9).

With this background, what of the alleged violations. First, if it is assumed that the RDF calibration particulars were not checked, in view of the testimony of the FCC inspector and the RCA technician, there are only two possibilities, either they did not see an appropriate record of check bearings but, for unknown reasons, have conspired to lie about it, or they did see them but they were fraudulently prepared by the vessel personnel. The first option does extreme violence to the normal presumptions respecting official duty (see *supra* at Fn. 5), and is clearly not within the privity or knowledge of Appellant. The evidence is clear that Appellant had instructed its personnel to comply with FCC regulations [Ex. 59], and had engaged RCA to assist in compliance. Appellant could do no more. The second option is also clearly outside of Appellant's privity or knowledge. The checks had to be made at sea [Tr. p. 1003] and the crew had been instructed to do so. In all events, therefore, Appellants had to rely on the crew's report and are no more in privity with the type of fraud that would be involved than they would be with negligent navigation, both of which

would occur at sea beyond their control. Appellant was not required to duplicate the FCC and RCA representatives' work by reviewing the calibration check record. However, assuming they had done so, what would they have seen; simply the same "fraudulent" (on our present assumption) record which they no more could have determined to have been fraudulent than could the FCC inspector or the RCA technician.

Turning then to the second "violation", failure to have aboard for one year a record of the checks of the calibration, the evidence shows [see Tr. pp. 992-993] that such was on board shortly prior to departure when the RDF was certified. This being the case had Appellant duplicated the work of the FCC and RCA men, all they would have seen was a record of checks of calibration.

Even assuming, contrary to fact, that the statutes and regulations required a table of deviations, rather than the record of checks of the calibration of the RDF to be maintained on board (see Court's Opinion pp. 16 and 18, fn 30 where it suggests it so understands the statute and regulations) there would be no evidence to sustain a finding of privity or knowledge. True the posted table was dated 1957, but there is no evidence that these were not the correct deviations for the permanent, but uncalibrated (because they did not exceed five degrees) errors. Indeed, as the uncontradicted evidence shows, application of the posted corrections to the observed bearings in each instance brought the result closer to the true bearings and left the remaining error within the range of expected transient error [Tr. pp. 631-634]. As long as the corrections were accurate they properly remained posted subject to the requirement that a prudent Master check them after departure (which he should do regardless of what was posted) [Tr. pp. 534, 636-637] and a prudent ship-

owner would assume that the Master would do so [Tr. pp. 518, 635]. The only negligence regarding a table of deviations was that of the Master occurring at sea after departure from Mobile. Of this Appellant had no knowledge nor privity.

V.

**Even Assuming a Violation of Statute and Privity
or Knowledge, It Was Not a Cause of the
Stranding.**

First, a failure to check the calibration could not have been related to the stranding if a check of its accuracy would not have shown a need to recalibrate. That is, if the check bearings were within the five degree error acceptable to the FCC, no action would then have been taken as a result of the check. The only evidence [Tr. pp. 642-643] is that the bearings obtained by the vessel on the night of the stranding were all within the allowed tolerance of the true bearing. Thus there is no way this failure, if it occurred, could have been related to the casualty.

Second, the absence of record of the checks of the calibration could have had no proximate relationship to the stranding. The check bearings required by the FCC to comply with the statute and regulations provide little navigational information and are not designed to be used in navigation. The FCC wants to know if the vessel has changed structurally sufficiently to require recalibration [see Tr. pp. 943-944, 946-947, 969-971] and for this purpose have concluded that one bearing in each quadrant will suffice [see Ex. 59, FCC Bul. 1007f]. On the other hand, a table of deviations such as Exhibit 35 contains multiple bearings relative to the ship's head and corrections for those bearings, based on errors not requiring recalibration. To navigate with such a table one corrects the RDF bearings obtained

by reading from the table the amount and direction of the required correction and applying it to the bearing obtained. The record of the check of the calibration of the RDF however, would have only four relative bearings with the appropriate correction, no two of which would be on headings closer than seventy degrees to each other [see Ex. 59].⁷ Since the "required record" could not have been used to correct bearings obtained in navigation, its absence could not have had any effect on the casualty.⁸

⁷Not even coincidence could in fact in this case have made a record of the required checks of the calibration of value in navigation. Exhibit 59 shows the four checks have to be within plus or minus 10° of 45°, 135°, 225°, 315°. The actual bearings obtained were as follows: 1640 Point Sur 000°; 1640 Point Arguello 057°; 1735 Point Sur 356°; 1854 Point Sur 347°; 1854 Point Arguello 024°; 1933 Point Arguello 004°; 2020 Point Arguello 334°. Of these bearings, only two, 1854 bearing on Point Arguello and 1640 bearing on Point Arguello, were closer than 20° to any bearing that would have appeared on the record of checks and only one, the 1640 bearing on Point Arguello was closer than 10° to such bearing. Of the two closest, the 1640 Point Arguello bearing was, in any event, a good one and the fix obtained at that time accurate, and the 1854 Point Arguello bearing was taken at the time of maximum twilight effect and thus should have been discounted. Obviously knowing the error as obtained as much as seven months earlier (within 90 days of the inspection) for a single bearing in the same quadrant no closer to the obtained bearing than 20° gives no guide to what correction to apply.

⁸That neither the statute nor regulations requires a current deviation, or for that matter, any deviation table, Appellant feels has been amply demonstrated (See pp. 3, 4 and 9 *supra*). Even if they did, however, the Trial court's conclusion that the *fixes* were "wildly divergent and inconsistent" and could not be explained by any absence of an up to date deviation table, was indeed correct. The RDF gives only bearings, whether corrected or uncorrected, and the *fixes* are obtained from those bearings by the officers. The bearings were consistent and within a normal degree of accuracy [Tr. pp. 642-3, and compare Finding 8. R. p. 849 with proposed and rejected Finding 7, R. pp. 894-5]. The *fixes*, as a result of negligence of the crew were wildly inconsistent [Tr. p. 525], not the bearings; thus the absence of an up to date table of deviations could have had no reasonable proximate relation to the stranding.

It is respectfully submitted the petition for rehearing should be granted.

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Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

DON A. PROUDFOOT, JR.

APPENDIX.

47 C.F.R. § 8.517(a) and (b) as of 1962.

§8.517 *Requirements for direction-finder.*

(a) To be approved by the Commission, as provided by § 8.516, the radio direction-finder (radio compass) shall:

(1) Be capable of efficiently receiving signals (at least types A2 and B emission) with the minimum of receiver noise, on each radio-channel within the frequency band 285 to 515 kc/s which is designated by the International Radio Regulations for distress, direction-finding, or marine radio beacons;

(2) Be capable of receiving types A1, A2, and B emission, if installed on board ship after January 1, 1940;

(3) Be capable of taking bearings on received radio signals as set forth in subparagraphs (1) and (2), of this paragraph, from which the true bearing and direction may be determined;

(4) Be accurately calibrated for the purpose of taking bearings from which the true bearing and direction may be determined for actual use in maritime radiolocation service and maritime radionavigation service; and

(5) Have a sensitivity, in the absence of interference, sufficient to permit of accurate bearings being taken on a signal having a field strength as low as 50 microvolts per meter.

(b) The calibration of the direction-finder shall be verified whenever any changes are made in the physical or electrical characteristics or the location of any

antenna(s) on board the vessel, or whenever any changes are made in any structure(s) on deck, which might appreciably affect the accuracy of the direction-finder. The calibration particulars shall be checked at yearly intervals or as near thereto as possible. A record of the calibration of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than 1 year from the date of the related action.